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SUPREME COURT OF THE UNITED STATES

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ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & CO.," BANKRUPTS,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

No. 209.

BRIEF FOR RESPONDENT.

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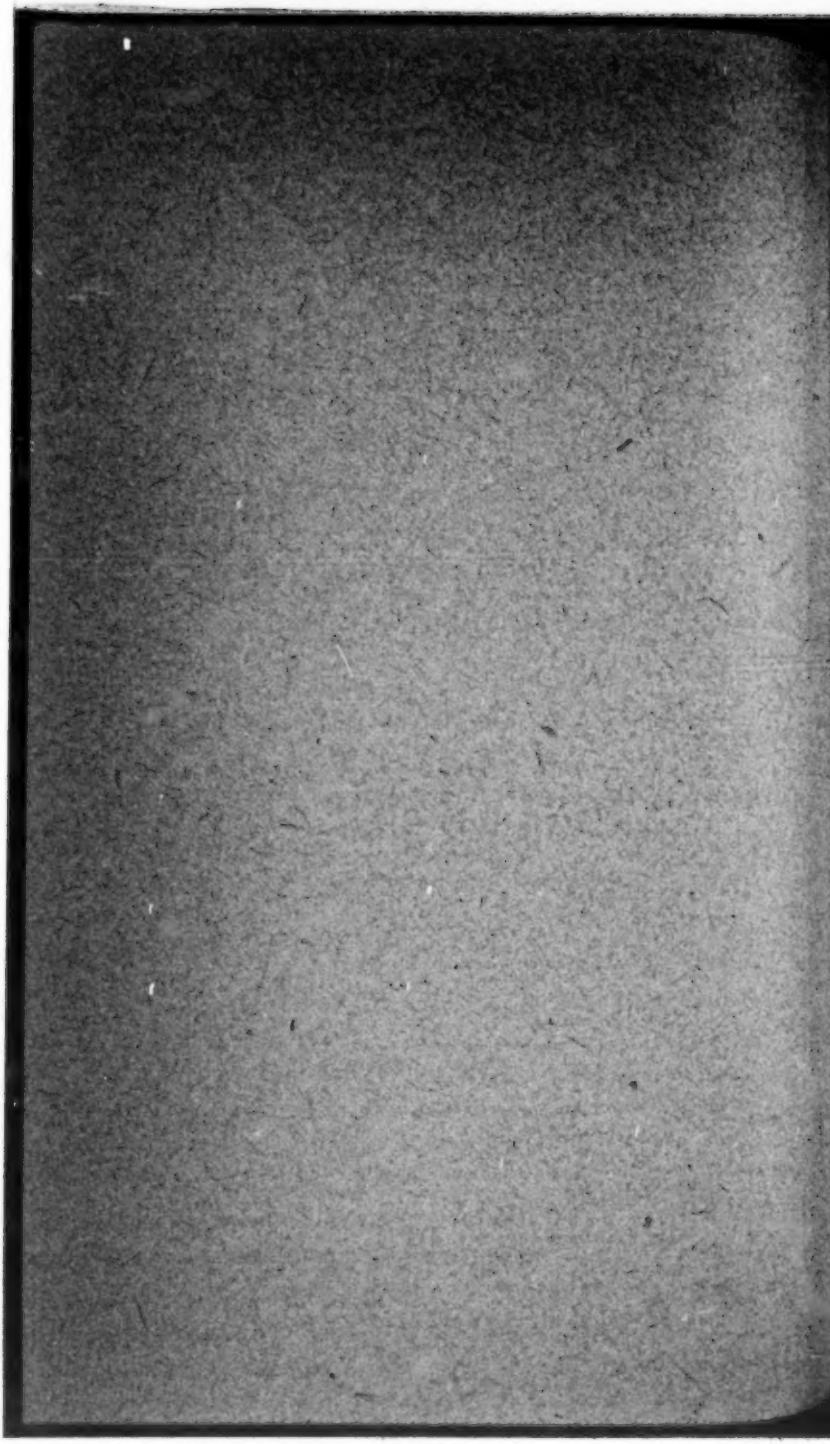
SYRACUSE, N. Y.
1907.



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The history of this litigation is stated with substantial correctness in the brief filed by the Petitioner. The statement of facts requires some correction and amplification which will be made in the discussion of the following points.

I.

The policies in question had a cash surrender value within the meaning of Section 70a of the National Bankruptcy Act and the Circuit Court of Appeals has properly decided that upon the payment of that cash surrender value to the trustee, the bankrupt may continue to "hold, own and carry" said policies as permitted by that section of the act.

The controversy is over three policies of insurance written by the Equitable Life Assurance Society, insuring the life of the Respondent in the aggregate sum of Ninety Thousand Dollars. While differing slightly in language, these policies are substantially alike and the controversy with reference to each is governed by the same principles.

The lower Court has held that the policies in question are Policies of Life Insurance and have a cash surrender value within the meaning and intent of the statute referred to, and that upon Respondent's paying such cash surrender value, which the record (page 31) shows to be $14,752.21, he may continue to carry such policies.

The decision remanded the cause (page 105) "with instructions to give the bankrupt an opportunity to pay and secure the actual value which would be paid on surrender according to the uniform practice of the company."

The Petitioner contends *first* that the policies in question are not life insurance policies. *Second*, that they have no cash surrender value.

At the outset of this litigation, an arrangement was made by which the premiums on the policies were to be paid without prejudice to either party until such time as the Court had determined whether or not said policies had a cash surrender value, and if they had no cash surrender value, whether they passed to the trustee or remained the property of the bankrupt. (Pages 19, 20, 59).

On policy No. 274445 of $20,000, Respondent had paid premiums at the time he was adjudged a bankrupt, for nineteen years. On policy No. 415768 of $20,000, he had paid premiums for fifteen years and on policy No. 417171 of $50,000, for fifteen years. The latter policy was so encumbered as to be of little if any value. (Page 21).

At the time of taking out the first policy, respondent was thirty-eights years of age, while at the time of taking out the second and third policies, he was but forty-two. (See Application and Policies). When this bankruptcy proceeding was instituted against him, he had therefore reached the age of fifty-seven years.

These policies had been taken out in good faith many years before bankruptcy threatened him and possessed a value as protection to the insured and his family, far beyond any sum which could be realized by the trustee in bankruptcy.

The policies are written on the usual tontine or endowment forms and while giving the insured various options, do not in express terms, give him the right to a cash sum on the surrender of the policies during the running of the endowment term.

That the policies in question had, as a matter of fact, and practice, a cash surrender value; that they were recognized by the company as having such value; that the same was determined by a fixed and definite method of computation uniform in all cases, and that such value

had without exception been paid to persons insured by the company upon surrender of like policies fully appeared by the evidence and was not contradicted. (Pages 26, 27, 30, 31, 32).

It also appeared that the company had fixed the cash surrender value of each of the policies in question, and offered to pay the same, and such cash surrender values were stated on the record by one of the company's managers as follows: (Pages 30-31).

Policy No. 274445,	$5905.65
Policy No. 417678,	2272.56
Policy No. 417171,	6574.00

These cash surrender values which the company stood ready and offered to pay were based on the definite method of computation referred to as applicable to all similar policies. Such uniform plan the company was bound to pursue as the Statutes of the State of New York prohibit a life insurance company from making any discrimination "*in favor of individuals of the same class or the same expectation of life either in the amount of premium charged or in any return of premium, dividends or other advantages.*" (Page 68).

Premiums on each of the policies having been paid for more than three years, respondent had at all times the right to surrender either of his policies and receive in lieu thereof, a paid-up policy (page 43) "for the entire amount which the full reserve on this policy according to the present legal standard of the State of New York

will then purchase as a single premium calculated by the regular table for single premium policies now published and in use by the society." This is substantially the legal requirement in the State of New York. (Page 67).

At page thirty-two Mr. Brainard, one of the company's managers, cross-examined by counsel for Petitioner, testified:

> Q. Mr. Brainard, you testified this morning, that the sum of money which your company would pay for the surrender of a policy of this nature, was computed according to a uniform rule adopted by it for policies of the same class, is that right?
>
> A. I did.
>
> Q. Upon what basis is that computation made?
>
> A. Do you mean what is the process of computing it?
>
> Q. Yes, or to what is it equivalent?
>
> A. It is equivalent to the percentage reserved under that policy which the company is willing to pay in consideration of the surrender.
>
> Q. Is the sum which you testified to this morning, $5,905, being the amount which your company would have given, for the surrender of policy No. 5, equivalent to the same sum as would be obtained if your company issued a

paid-up policy as it is bound to do under the terms of Exhibit 5, and then figure the value of that policy?

A. Yes, it is.

By the Court:

Q. If this policy, Exhibit 5, were presented and a demand under it made for a paid-up policy, such a paid-up policy would be issued under the provisions of the conditions of Exhibit 5, and is that present cash value of that paid-up policy the measure of the amount which you stated as the cash surrender value which the company is willing to pay?

A. That is as I understand it.

Q. So that instead of giving a paid-up policy the company is willing to give an equivalent of that amount in cash?

A. Yes.

Petitioner contends that the fact that the cash surrender value of the paid-up policy which the company agreed and was bound to give, is the measure of the cash surrender value of these policies in some way differentiates them from other policies having a cash surrender value. We do not appreciate the argument. The contractual and statutory obligation to give the insured a paid-up policy assures a cash surrender value and fixity and uniformity in its payment. It is apparent as a practical question that policies having a cash surrender value will have a paid-up policy value and *vice versa*.

In the MacKinney case (15 Federal Reporter, 535, 538), which will be referred to more at length later, it was the fact that the company was under obligation to give a paid-up policy equivalent to four-fifths of the reserve that gave the policy its cash surrender value. Here the company is under obligation to give a paid-up policy equivalent to the full reserve (pages 52, 67). It would seem that the payment of cash surrender values is largely the outgrowth of statutes designed to protect the policy holder who was unable to continue his policy and had made default.

It is apparent from the evidence in the case (pages 29, 31) that a policy, giving the insured the right to demand a definite cash sum upon the surrender of the same, could not have been procured at the time respondent obtained the insurance on his life nor for many years thereafter. Although the Equitable Life Assurance Society has been one of the most progressive companies, modern in all its methods, Manager Brainard testified that he never knew of a policy being issued prior to 1896 with a definite provision for or promise of a cash surrender value.

The surrender value of the policies in question here is payable at the usual time and on the usual and ordinary conditions, namely, that they must be presented for surrender within six months after default in the payment of a premium.

Neither by the policies in question nor under any other

form of insurance contract, so far as the record discloses, is the insured given the right to surrender his policy at any moment and demand the cash value.

Under all forms of insurance contract issued by the Equitable Life Assurance Society, even the new table policies with definite provision for a cash surrender, the insured must demand the cash surrender value upon the lapse of his policy or within a given period after default in the payment of a premium. (Pages 27, 29).

The conditions upon which the cash surrender value will be paid are precisely the same with all forms of policies. (Page 29).

It would seem to be a sufficient answer to petitioner's argument on this point that the cash surrender value will be paid on these policies in the usual and ordinary course of business—upon the same terms and conditions—as the policies before the Court in Holden vs. Stratton, 198 U. S., 202, and *in re* Boardman, 103 Fed. Rep., 783.

The reports of other cases and the statutes of the several States relating to this subject, do not indicate that surrender values are paid by other companies on any different terms than those adopted by the Equitable Society. There is nothing in the record here from which it can be inferred that different conditions prevail with other companies.

The petitioner has made quite an extensive argument against interpreting the statute to include these policies

on the ground that in the case of one of them which had run for nineteen years, the time was near at hand when the term of the policy would be complete and the assured would be in a position to exercise either of the several options reserved in the policy, one of which would permit him to receive a sum in cash considerably greater than the cash surrender value at the time of the adjudication in bankruptcy, as it would include dividends and profits.

We fail to see how the condition of this particular policy at the time of the adjudication in the bankruptcy proceeding throws any light upon the interpretation to be given to the statute. Had the policy been in force but two years no point could be made of it. Because the policy had but a few months to run and therefore there was considerable disparity between its cash surrender value and its full value at the end of its term, can we say it was not a life insurance policy?

Petitioner says that by paying another premium and continuing the policy, the trustee could get the benefit of the matured value of the policy; he could carry it at a reduced premium; surrender it for a life annuity; withdraw the surplus and continue the policy on the ordinary plan; exchange for a paid-up policy or take the reserve value, surplus and dividends and consent to the cancellation of the insurance. The argument does not consider that this would be to deprive the insured and confirm in the trustee, the very benefits which it was the intention of the statute to permit the bankrupt to enjoy.

The argument would exclude all policies maturing be-

fore the death of the insured, and which would naturally have a substantial cash surrender value, and limit the application of the statute to straight-life policies, a class which except for statutory provisions in some States, would have little, if any, cash surrender value.

No argument of general value or application can be based on a peculiar situation with reference to a single policy. This is particularly true where the only question is as to the interpretation to be given to the language of a statute.

The cash value which this policy has gained pending the proceeding in bankruptcy, is of no more consequence in the interpretation of this statute than is the fact that pending the proceeding, the policy of Fifty Thousand Dollars has been sold by a creditor who held it as collateral to his debt so that it is now lost to the bankrupt.

There is nothing in the record in this case, nor in the facts as disclosed in the reports of other similar cases, indicating that the sum offered upon the surrender of one of these policies is less than would be received upon the surrender of a policy of any other kind that is written, of like age and amount.

The record does not disclose then the slightest practical difference so far as concerns surrender value, between the policies in question here, and the new form policies with a definite provision for and tables of cash surrender values.

The fact that these policies state or indicate that they do not have a cash surrender value is of no consequence when the company has tendered such value.

There remains the theoretical difference only; in one case the insured at the time and under the conditions outlined in his policy, can demand a cash sum upon its surrender. In the other, the company being under no legal obligation, tenders a like sum payable at the same time and upon the same conditions.

Petitioner insists that the provision of the Bankruptcy Law permitting the insured to retain his policies on payment to the trustee of their cash surrender values, applies to the one case and not to the other. He concedes, and it is the theory of the cases upon which his argument rests, that if the company were legally bound to pay the precise sum which it has tendered in this case, the respondent could have the benefit of the statute, but since the company tenders that sum, not being so bound, he says that the statute does not apply. Upon this theory, if in this case the company were legally bound to pay Fourteen Hundred Dollars, the trustee would be compelled to accept that sum, while a voluntary offer of Fourteen Thousand Dollars could be disregarded. The statute under consideration says: "When any bankrupt has any life insurance policy which has a cash surrender value." This description is as broad and general as our language permits, no distinctions or discriminations are made or even remotely suggested. That it does not alone refer to table forms promising definite sums at definite periods in

the life of the policy is apparent from the provision that the bankrupt is not called on to act until "after the cash surrender value has been ascertained and stated."

An interpretation of the statute which would confine its application to a class of policies limited in number and only recently offered to the public, issued by some companies and not by others, and which would exclude from its benefits all old-line policies, all straight-life policies, and all the various forms of policies redeemable in cash, though redemption is not expressly guaranteed in the policies, would be narrow and unjust, and would convert a wise and beneficent statute of general application into a provision, technical, discriminating and partial.

Beginning with what is known as "straight-life" policies, the business of insurance has grown until countless forms of policies are now offered to the public, each company aiming in its own particular way, to meet the wish of every possible candidate for life insurance. The plans are worked out by actuaries and are based on definite and known conditions and one policy equalizes with another.

It is well known that the insured can usually obtain a cash sum upon the surrender of his policy, but that he thereby loses his right to participate in dividends, surplus and profits. It is to the interest of the company to encourage its policy holders to persist in the payment of premiums, and no policy holder can obtain a sum upon the surrender of his policy equal to its value if he persevere to the end. But where the company, as in this case,

and as is the case with all companies in the State of New York, is bound upon surrender to give a paid-up policy for a sum computed on a definite basis, it follows that the insurer as the company in the present case has uniformly done, will pay the insured, the equivalent of the paid-up policy in cash.

If the statute should be limited to cases where the company is under compulsion to pay a cash surrender value, then not only is a discrimination made between holders of policies of slightly different form, but between holders of the same policy resident in different states. For instance, a company might in New York State be compelled to give only a paid-up policy (page 68), while in Kentucky, the law would force it to give the equivalent of the paid-up policy in cash. (Kentucky Statutes—Carroll, 1903—Sec. 659). So that according to the theory proposed by petitioner, the same policy might have a cash surrender value in Kentucky and none in New York, although the same sum could be realized upon the policy in either State.

It is, therefore, quite apparent that if the Courts are to attempt to distinguish between policy holders upon the basis of the surrender value being paid voluntarily or by compulsion, not only will confusion result and injustice be done, but the statute will be to a large extent annulled.

The argument for this narrow construction overlooks the policy of the law carefully pointed out in the recent case of Holden vs. Stratton (198 U. S., p. 202).

We assume that the prime object of Congress in including in Section 70a the proviso under consideration, was as stated by Justice White in the above case: "To confer a benefit on the insured bankrupt"; to preserve to the bankrupt, a kind of property which has a value peculiar to himself and as protection to his family.

It is apparent that to a man of respondent's age, the loss of these policies is irreparable. That in many cases advancing years and declining health would prevent a successful application for further insurance and if obtained it would be at a cost commensurate with the increased risk.

In the second place, such policies would have no value to the trustee, excepting as it could be obtained by a surrender of the same for cash.

The necessity of a prompt settlement of bankrupt estates would prevent the continuance of policies for a term of years. Then it is clearly contrary to the policy of the law to permit the trustee of a bankrupt estate to continue the payment of premiums on the bankrupt's insurance policies, even though the age and state of health of the insured bid fair to make such a speculation profitable.

Again, the trustee would have no such insurable interest in the life of a bankrupt as would permit him to take out or continue insurance upon his life. Further, it would scarcely be good policy to sell contracts of insurance on the bankrupt's life as suggested by petitioner to persons who would buy for purposes of wager or specula-

tion even though the policies would have a value in the hands of such speculators well beyond their cash surrender value. This also would be to permit the speculator and the trustee to have the benefit of the very property in the policy which it was the object of the law to preserve to the bankrupt and would be against public policy as declared by this Court.

Warnock vs. Davis, 104 U. S., 774, 779.

N. Y. Life Ins. Co. vs. Armstrong, 117 U. S., 591.

Crotty vs. Union Mutual Ins. Co., 144 U. S., 621.

It is lastly to be considered that under the former Bankruptcy Act, this very question of surrender value had been before the Courts and it had there been decided that insurance policies passed to the assignee in bankruptcy only to the extent of their "cash surrender value"; that being treated as the sum which the company would voluntarily pay upon the surrender of the policy.

Such was the law and these are the circumstances existing at the time of the passage of the present Bankruptcy Act.

Did Congress manifest an intention to change the law as it had been understood and practiced under the former Bankruptcy Act? The contrary is clearly true, for while the former act contains no provision permitting the insured to redeem his policy by paying its cash surrender value—that was worked out by the Courts—the framers

of the present act borrowed from the Court decisions this very principle and embodied it in the statute, and embodied it in plain and general language applicable to all policies of life insurance having a "cash surrender value"; that being the exact term used in the MacKinney case to describe a policy upon the surrender of which the company was willing to pay a cash sum. (*In re* MacKinney, 15 Fed. Rep., 535).

Had Congress intended to exclude endowment policies, term policies, ten, fifteen or twenty annual payment policies, tontine, semi-tontine, or free tontine policies, bond or bounty policies, there would have been some indication of that fact.

The petitioner makes distinctions where Congress made none. However forceful his argument might be before a legislative body, having legislation on the subject in contemplation, we submit that it is not relevant in this Court, for however valuable an argument may be made that Congress ought to have distinguished between the various forms of life insurance contract—and we fail to see any just ground of discrimination—the fact remains that it did not do so; and if a distinction is to be made, the one suggested here is not a just one, resting as it does on form rather than substance, discriminating as it does between policies precisely the same in practice and legal effect.

If distinctions are to be made, if some policies having a cash surrender value are to pass to the trustee absolutely

while others may be redeemed, such distinction and discrimination should be made by Congress after a careful investigation of all the facts and should rest on some consistent and rational basis. The Court should not impute to Congress, an intention not manifested in its act. That would be, as aptly stated in Holden vs. Stratton, "not construction but legislation."

The question as to what interest in an insurance policy on the life of the bankrupt, payable to his estate passed to the assignee in bankruptcy under the Act of 1867 was discussed by Judge Brown of the Second Circuit in an opinion which remained an unquestioned authority while that Act was in force. (*In re* MacKinney, 15 Fed. Rep., 535).

It has recently been cited with approval by the Supreme Court, Holden vs. Stratton (198 U. S., 202, 214), and by the Circuit Court of Appeals for the Second Circuit (*In re* Coleman, 136 Fed. Rep., 818), and undoubtedly was the occasion for the adoption of the proviso to Section 70a of the present Bankruptcy Act.

The Act of 1867, in language sufficiently comprehensive to embrace the most minute and temporary interest in property, vested in the Trustee all the assets of the bankrupt. By its terms the Act preserved to the bankrupt no interest in insurance policies on his life.

It appeared that the bankrupt, Andrew MacKinney, had a policy with the Berkshire Life Insurance Company of $3,000, which was payable to his estate. The policy

was not turned over to the assignee in Bankruptcy, but the wife continued to pay the premiums upon the same until the death of the bankrupt, when the question arose as to what part, if any, of the $3,000 owing by the company was payable to the trustee in bankruptcy. The referee reported that the net value of the policy at the time of the adjudication in bankruptcy was $686.42, which was more than would have been paid for the surrender at that time". By the terms of the policy, there was no sum which the insured could at the time of his bankruptcy, demand upon the surrender of the policy but the company was willing to pay a certain portion of the reserve, and this sum, the Court throughout its opinion treats as the "cash surrender value"; in the course of its opinion, saying: (pages 537 and 538).

> "Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured or his representative. *A return of a part in some form or other, is now usually made; and by the provisions of this policy, under the Law of Massachusetts, four-fifths of this reserve or surrender value was applicable on default as a single premium for a paid-up policy. To any person, moreover, having an insurable interest in the life of the insured, and desirous of maintaining the policy to whom it might be assigned, this surrender value would be worth its full tabular*

amount. To the extent of its actual cash surrender value therefore, this policy at the time of the bankruptcy was 'property' and 'effects' of the bankrupt within Sections No. 5044 and No. 5046 of the Revised Statutes, and as such passed to the bankrupt's assignee. So far as necessary to make the cash surrender value available, the title to the policy also passed to the assignee, so that he might thereafter either surrender it to the company or assign it over either to the bankrupt or to any other person having an insurable interest in his life, upon receiving payment of the surrender value at that time or so much of it as the assignee might be able to obtain."

In a further division of the opinion, the learned Judge continues: (page 539).

"The assignee moreover, could have no right to use moneys of the estate to pay premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. The speedy settlement of estates of bankrupts, as contemplated by law, is incompatible with such dealings.

But not only was the executory part of this policy, i. e., everything beyond its surrender value, not assets of the bankrupt, but the as-

signee in bankruptcy had no such insurable interest in the life of the bankrupt as rendered him an assignee legally capable of continuing the policy for his own benefit, and ultimately recovering the whole amount under it." (Citing Warnock vs. Davis, 104 U. S., 775).

The Court decided that out of the avails of the policy there should be paid to the assignee in bankruptcy the cash surrender value thereof, and the balance should pass to the estate of the deceased bankrupt.

In the case entitled *in re* Newland, 6 Ben., 342 (18 Fed. Cases, 90), a creditor held a policy of insurance of $4,000 upon the life of the bankrupt as collateral security for the payment of a debt of $3,450. The creditor, attempting to prove her claim for the full amount, the assignee in bankruptcy insisted that she must either surrender the policy to him and take a dividend on her entire claim or retain the policy and withdraw her proof of debt. The Court, Judge Blatchford rendering the decision, permitted her to retain her policy and prove her claim at the full amount less the cash surrender value of the policy which was $13.13.

In view of the principles laid down in the recent case of Holden vs. Stratton, above cited, and of its expression upon the precise question here involved, a lengthy discussion of the cases on this point decided by the lower Federal Courts, since the passage of the present Bankruptcy Act, seems unnecessary.

In re Boardman (103 Fed. Rep., 783), involved a policy issued by the same company and on the same form as two of the policies in controversy here. The question there, as here, was whether the policy had a "cash surrender value" within the meaning of Section 70a. The policy was for $2500. The company offered to pay the assured $692.50 in cash upon the surrender. *The conditions were the same as here—surrender value to be paid on default in payment of a premium or within six months thereafter.* The referee reported:

> "I think the policy has a 'cash surrender value' within the meaning of the Bankruptcy Act. I do not find that there is any exact definition of this term as a matter of judicial determination. But it seems to me to mean the sum the company will pay upon the surrender and discharge of the policy; and it makes no difference whether the amount is an arbitrary one fixed by the statute or one settled by the terms of the policy or merely a voluntary matter on the company's part."

Judge Lowell, in confirming the referee's report said:

> "In this case I agree with the referee. The policy has a cash surrender value within the intent of the statute. The fact that this value is not stated in the policy is immaterial. If in the ordinary course of business, the bankrupt can obtain cash from the company by a surrender of this policy, the creditors are entitled to the cash."

In the above case, the bankrupt claimed that the policy had no cash surrender value, therefore it did not pass to the trustee, while the trustee claimed that it had a cash surrender value, which he was entitled to receive. Evidently it did not occur to the attorney for the bankrupt, the trustee, or the distinguished Judge, that the policy could be claimed by the trustee as his sole property on the ground that it had no cash surrender value.

The following cases also bear upon this point.

In re Lange, 1 Am. B. R. (91 Fed. Rep., 361).
In re Steele, 98 Fed. Rep., 78.
Steele vs. Buell, 104 Fed. Rep., 968.
In re Coleman, 136 Fed. Rep., 818.

In re Welling (113 Fed. Rep., 189), and *in re* Slingluff (106 Fed. Rep., 154), are the authorities relied on by the Petitioner. In each the Court reached the conclusion that Section 70a of the Bankruptcy Act applied only to cases where the policies had a definite provision as to cash surrender value. In neither, however, did the Court go to the length of holding, as did the District Court in the present case, that the bankrupt had no interest in the policies on his life, and that they passed absolutely to the trustee; in order as stated in the decision (page 91) "to permit of the sale of said policies by said trustee or the exercise of the options provided in said policies by said trustee or the collection of any moneys due or to become due from said life insurance society upon the said policies or either of them."

In neither of these cases was the practice under the former Act in Bankruptcy discussed, nor were the authorities cited in this connection by the Supreme Court in Holden vs. Stratton considered.

In the Slingluff case, the Court says: "It may be that if the whole sum secured by the policy should be collected by the trustee, only the proportion thereof ascertained to have been equitably to the credit of the policy at the date of the adjudication with the outlay for premiums would be allowed to be retained by the trustee. But the question of whether the trustee would be entitled to the whole proceeds or not, it is not at all necessary to consider now in this case, for if necessary to be ascertained there are settled principles upon which an actuary can determine the amount to which the policy was entitled equitably at any stated date."

In the Welling case, the Court in concluding its opinion, discussing the question of equitably distributing the proceeds of the policies, says that there are two modes, "One is to ascertain, if it be possible, the actual value of the policy at the date of the adjudication in bankruptcy and the equitable apportionment of that value among the respective interests in the policy; and then in analogy to the declared policy of the law as stated in the proviso, to permit the bankrupt if he so desire, to pay to the trustee that proportion of the actual value which would be coming to him at the time stated and upon the plan suggested, and that the trustee thereupon convey all claim to the policy to the bankrupt.

The other plan is to direct a sale by the trustee of the interest of the bankrupt in the policy at the date of the adjudication in bankruptcy."

Each of these decisions indicates the difficulties met in trying to adjust the eqiuties of the parties when the plain language of the statute is departed from.

More than passing discussion of the decision of the Supreme Court in the recent case of Holden vs. Stratton (198 U. S., 202) would be superfluous.

We note that one of the policies under discussion there was written on the tontine plan, the same as the policies here, and contained the same provision regarding the exercise of the various options at the expiration of the twenty year period.

That such policy was construed to be a life insurance policy and embraced by a statute exempting life insurance policies in general terms.

That the purpose of the proviso of Section 70a was to confer a benefit on the insured bankrupt, and that an interpretation incompatible with its spirit was to be avoided.

In conclusion, the Court having before it in the briefs and argument of counsel, the several authorities relied upon by the respective parties to this litigation, expressed its opinion upon the precise question under discussion here, in the following terms: (page 214).

> "There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words cash surrender value as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the Bankruptcy Act of 1867, *in re* Newland, 6 Ben., 342; *in re* MacKinney, 15 Fed. Rep., 535, and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it."

We are disinclined to consider this deliberate statement as a "chance remark" as suggested on page 7 of Petitioner's brief.

On the contrary, noting and respecting the reservation in the concluding words just quoted, we believe that the opinion taken in its entirety is authority for the claim urged by respondent, and that the construction of the

statute under consideration, there suggested does, as the Court found, preserve to the bankrupt the benefits contemplated by the proviso "harmonize with the practice under the previous Bankruptcy Act," and "elucidate and carry out the purpose contemplated by the proviso;" as in such opinion construed.

II.

Insurance policies having no cash surrender value do not pass to the trustee as assets.

The above point does not become of consequence unless the Court shall find that the policies in question are not policies having a cash surrender value.

Our reasons for believing that it was not the intention of Congress that insurance policies, upon the surrender and cancellation of which no sum could be obtained, should pass to the trustee are as follows:

1. It had been held under the Bankruptcy Act of 1867 which contained no provision reserving any right in insurance policies to the bankrupt, that only the cash surrender value of the policies passed to the trustee.

In re MacKinney 15 Fed. Rep., 535.
In re Newland, 6 Ben., 90.

2. It had likewise been held under that act, in the light of decisions of the Supreme Court, that the trustee

had no such insurable interest in the life of the bankrupt as would enable him to take out or continue policies of insurance on his life.

"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name."

Warnock vs. Davis, 104 U. S., 775, 779.
New York Life Insurance Co. vs. Armstrong, 117 U. S., 591.
Crotty vs. Union Mutual Insurance Co., 144 U. S., 621.
In re MacKinney, 15 Fed. Rep., 535, 539.

3. It is not practical or consistent with public policy that the trustee shall continue contracts of insurance on the life of a bankrupt or that he shall sell them to others having no insurable interest in the life for the purpose of wager or speculation.

In determining matters of public policy, and in construing the United States Statutes with reference to that policy, the law of the United States, not the law of the State where the bankrupt resides, should control.

4. It would deprive bankrupts holding certain old line or old form policies, assessment and fraternal policies, of their insurance, with little or no benefit to the trust estate.

5. The proviso does not by its language contemplate that policies of insurance pass to the trustee subject to re-

demption in particular cases by the bankrupt, but clearly evidences that only such policies pass as have a cash surrender value, which the insured refuses to pay.

The act does not say that the bankrupt upon paying within the stipulated time, the cash surrender value of the policy, may redeem same from the trustee but that the bankrupt may upon such payment, "*continue* to hold, own and carry said policies." *Upon the expiration of the stipulated time,* if he fails to make such payment, "the policy shall *pass* to the trustee as assets."

If the policy, as contended, becomes assets in the hands of the trustee by reason of the general provisions of subdivision 5, there would be no force to the language, the bankrupt "shall *continue* to hold, own and carry." There would be no occasion for enacting that if the bankrupt failed to pay the cash surrender value within thirty days after it was ascertained, then the policy should *pass* to the trustee as assets.

6. The construction contended for here is supported by the following cases in the lower Federal Courts decided under the present Bankruptcy Act.

In re Lange, 91 Fed. Rep., 361.
In re Hernich, 1 Am. B. R., 713.
In re Buelow, 98 Fed. Rep., 86.
In re Josephson, ~~116~~ 121 Fed. Rep., ~~404~~ 142.
Morris vs. Dodd, 94 Georgia, 606.

III.

The decision of the Circuit Court of Appeals correctly determines the rights of the respective parties preserving to the trustee the full cash surrender value of the policies and confirming in the bankrupt, the title thereto after the payment of such surrender value. It gives effect to the plain language and intent of the statute and its judgment should be sustained.

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